

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2013-419619-002 DT

05/10/2016

HON. TERESA SANDERS

CLERK OF THE COURT
S. Radwanski
Deputy

STATE OF ARIZONA

MARY-ELLEN WALTER

v.

DARNELL MOSES ALVAREZ (002)

MICHAEL ZIEMBA
ANNA M UNTERBERGER

CAPITAL CASE MANAGER

UNDER ADVISEMENT RULING

The Court has read and considered defendant's *Motion to Preclude Psychological Testing by the State*, and *Motion to Permit Counsel to Attend Psychological Interview of Defendant, For Videotaping of Examination/Testing of Defendant and Request for Production of Raw Data*, and the responses and replies to each motion. The Court has also considered the arguments of counsel.

The Defendant first requests that the Court preclude the State from conducting their own psychological testing of the defendant, and limit the State's expert to examining the data produced by the defense expert. Secondly, he requests that in the event the Court denies his first request, that the Court enter orders (1) allowing defense counsel to be present at any examination, (2) requiring that the examination be videotaped, and (3) requiring that all raw data from the testing be provided to the defense expert. At oral argument in this matter, he further requested that the Court enter orders (1) prohibiting the State's expert from questioning the defendant about the offense, and (2) if the State's expert is permitted to question the defendant about the offense, that the report be given to defense counsel prior to disclosure to the State so that they can make redactions of the defendant's statements.

A defendant who places his or her mental condition at issue in the penalty phase of a capital trial is subject to an examination by a state expert. *Phillips v. Araneta*, 208 Ariz. 280, 283, ¶ 9, 93 P.3d 480, 483 (2004). Such an examination ensures that the State will be able to

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meaningfully rebut the Defendant's expert testimony in the penalty phase of trial. *Id.* The Court will not restrict the questions that the State's expert may ask the Defendant.

The Court will not require that the report be submitted to defense counsel for redactions, however, no statement made by the Defendant during the examination, no testimony of an expert based on any such statement, and no other fruits of any statements made during the course of any examination may be used by the State or admitted into evidence "except on those issues on which the defendant introduces expert testimony during the penalty phase of the trial." *Id.* at 284, ¶14, 93 P.3d at 484. Specifically, the Defendant's statements regarding the offense may not be used against him in the guilt or aggravation phases of trial.

The Court will not require the presence of counsel if the expert wishes to conduct the examination without counsel's presence. *See State v. Shackart*, 175 Ariz. 494, 501, 858 P.2d 639, 646 (1993) (no constitutional right to have counsel present during mental health examination). While the Court encourages the State's mental health expert to record the examination, the Court will not order the expert to conduct the examination in any particular way, including whether the examination is recorded. Any raw data produced from that examination shall be disclosed to the defense expert. Therefore,

IT IS ORDERED denying the defendant's *Motion to Preclude Psychological Testing by the State*.

IT IS FURTHER ORDERED denying the defendant's *Motion to Permit Counsel to Attend Psychological Interview of Defendant and for Videotaping of Examination/Testing of Defendant*.

IT IS FURTHER ORDERED granting the defendant's *Request for Production of Raw Data*.

IT IS FURTHER ORDERED that the examination of the Defendant be conducted consistent with the above-stated parameters.